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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LAO DO,

Defendant and Appellant.

D060000

(Super. Ct. No. SCD233000)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed as modified.

Lao Do pleaded guilty to possessing a firearm after being convicted of a felony (former Pen. Code, § 12021, subd. (a)(1))¹ and possessing ammunition when prohibited from doing so (former Pen. Code, § 12316, subd. (b)(1))². The court placed Do on three

¹ Effective January 1, 2012, former Penal Code section 12021 was repealed and reenacted without substantive changes as section 29800.

² Effective January 1, 2012, former Penal Code section 12316 was repealed and reenacted without substantive changes as section 30305.

years' probation. By expressly adopting the recommendations in the probation report, the court imposed a \$200 base fine, a \$560 penalty assessment and a \$40 surcharge (Pen. Code, § 1465.7, subd. (a)), for a total of \$800.

Do appeals, contending the \$800 total must be reduced to \$760. He argues it is unclear how the court calculated the \$560 penalty assessment because the court did not fulfill its duty to set forth in the record all fines, fees, penalties and surcharges; and \$40 of the \$560 appears to be unauthorized by law.³ In its letter brief, Respondent does not address the merits, but states "the Attorney General does not have the resources to respond in a full brief to such a de minimus claim" Respondent notes Do did not object in the trial court, but does not argue he has forfeited the right to challenge the penalty assessment.⁴ Respondent argues the appeal should be dismissed "with the suggestion that appellant return to the trial court to seek redress of his grievance concerning the \$40 penalty assessment." In his reply brief, Do contends he has a statutory and due process right to raise the issue on appeal.

In support of its dismissal request, Respondent cites *People v. Knightbent* (2010) 186 Cal.App.4th 1105 and *People v. Fares* (1993) 16 Cal.App.4th 954. Both cases are inapposite. In *People v. Knightbent*, *supra*, the appellant contended a \$34 fee should be reduced to \$10. (*Id.* at pp. 1107-1108.) The reviewing court concluded the correct fee was \$66 and modified it accordingly (*id.* at p. 1108), noting the appeal had required "the

³ Do also complains the court did not state the statutory basis of the \$200 base fine, but does not contend the base fine was improperly imposed.

⁴ Do's contention the court imposed an unauthorized monetary penalty may be raised for the first time on appeal. (See *People v. Smith* (2001) 24 Cal.4th 849, 852 [restitution].)

services of an appointed counsel and a deputy attorney general, together with three justices and staff of this court" (*id.* at p. 1107). In *People v. Fares, supra*, the defendant appealed the sentencing court's failure to award conduct credits. (*Id.* at p. 956.) A panel of this court expressed dismay "that this attempt at a minor correction of a sentence error has required the formal appellate process" (*id.* at p. 957), remanded the case for a determination of credits (*id.* at p. 960) and stated that in the future, an issue regarding calculation of credits should be addressed first in the trial court via a motion for correction (*id.* at pp. 958-960).

In this case, Respondent's implied concession on the merits of Do's claim appears to be correct. The \$560 penalty assessment represented \$28 for every \$10 of the \$200 base fine. Presumably, the probation officer calculated the \$28 by adding the amounts in Government Code sections 76000 (\$7), 76104.6 (\$1), 76104.7 (\$3), 76000.5 (\$2), 70372 (\$3; see *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1253) and Penal Code section 1464 (\$10), for a total of \$26, and for the remaining \$2, used the 20 percent formula in Penal Code section 1465.7, subdivision (a). The \$40 of the penalty assessment attributable to Penal Code section 1465.7, subdivision (a), duplicates the separate \$40 surcharge. We reduce the \$560 penalty assessment by \$40.

DISPOSITION

The \$560 penalty assessment is reduced by \$40 to \$520. As so modified, the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.